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Supreme Court of the United States Rule 42 v

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 49

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

FLEETWOOD TRAILER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the effort of the National Labor Relations Board to have the decision of the court below reversed, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty-nine affiliated labor organizations with a total membership of approximately thirteen million five hundred thousand. In *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U. S. 221, 233-235 (1963), this Court recognized and emphasized, as it has in numerous decisions, Congress's solicitude for the right to strike since it is the "economic

weapon which in great measure implements and supports the principles of the collective bargaining system." In short, the Court recognized that the policy of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) as expressed in Sections 1, 7 and 13 is to achieve overall industrial peace by encouraging collective bargaining between parties who have relatively equal bargaining power. Inherent in this conception is the guarantee to employees of a meaningful right to strike. The strike is a limited weapon with a limited purpose. That purpose is to win beneficial changes in wages, hours, terms and conditions of employment. It is a limited purpose because even when those benefits are won, they are not won in perpetuity. Collective bargaining agreements are for limited terms and when they are subject to reopening, employers have the unfettered right to insist, in good faith, that past employee gains be undone. *National Labor Relations Board* v. *American National Ins. Co.*, 343 U. S. 395 (1952). Thus, as *Erie Resistor* recognizes, the Act must be construed so as to limit, in turn, the risks employees run by striking, see *National Labor Relations Board* v. *Burnup & Sims*, 379 U. S. 21 (1964); *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F.2d 87, 91 (4th Cir., 1953), certiorari denied, 347 U. S. 935.

Not every strike is won. Moreover, as this case illustrates, many strikers who participate in a losing strike wish to return to work for the employer on his terms. Indeed, in many situations, because of their skills or the general nature of employment opportunities in the area in which they live, they have no other choice. The compulsion on them to return is often heightened by the fact that they have valuable unvested benefits as employees of the employer, such as seniority, pension rights or accrued vacation pay, etc.; benefits they would forfeit if they went to work elsewhere, or if their tenure as employees were to be considered broken by the strike even though they are event-

ually reinstated. The issue in the instant case is the extent to which the Act protects a striker's right to reinstatement and his tenure as an employee. Given the realities of the situation, this issue is plainly of the most substantial importance to the labor movement. For this reason, the AFL-CIO, as the majority spokesman of organized labor, seeks leave to file a brief as *amicus curiae* in order to give the Court the fullest possible view of the problem presented for resolution here.

ISSUE NOT COVERED BY THE PETITIONER

The Board takes the position that an employer violates the Act if he refuses to honor a striker's continuing application for reinstatement as jobs open up, and at the first available opportunity, and instead hires a new applicant for employment. It qualifies its position, however, by assuming that there is no violation if the employer hires a new applicant for an open job, and bypasses the striker as long as the striker's job was considered to have been permanently abolished or was being filled by a permanent replacement at the time the striker applied for reinstatement. This qualification is based on its reading of this Court's decision in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346 (1938). We believe that this qualification is incorrect and that the employer has a duty to honor the striker's application as positions become available in all of the instances just noted. Moreover, we believe that the Board's position is based on a misreading of this Court's decision in *Mackay*. The main portion of our brief as *amicus curiae* will, therefore, be devoted to developing these points and to setting out and defending what we believe to be the proper rule of law that should govern here.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompany-

ing brief *amicus curiae* in the instant case in support of the effort of the National Labor Relations Board to have the decision of the court below reversed.

Respectfully submitted,

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August 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 49

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

FLEETWOOD TRAILER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out on pp. 1-4. of the brief of the National Labor Relations Board.

The interest of the AFL-CIO is set out on pp. v-vii of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

AN EMPLOYER WHO REFUSES TO GIVE EFFECT TO A STRIKER'S CONTINUING APPLICATION FOR REINSTATEMENT AND WHO BYPASSES THE STRIKER AND INSTEAD PREFERS A NEW APPLICANT FOR EMPLOYMENT VIOLATES THE NATIONAL LABOR RELATIONS ACT

It is well settled that an employer who has jobs available which he is filling at the time economic strikers request reinstatement may not bypass the strikers and prefer new applicants for hire.[1] Pursuant to Section 2(3) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) the strikers are employees and the employer has an obligation to honor their applications for reinstatement and to treat them in all matters involving continuity of employment as though they had not been absent from work. His refusal to do so necessarily interferes with the right to strike in violation of Section 8(a)-(1), and discriminates against the strikers because of their participation in concerted activity, protected by Sections 7 and 13, in violation of Section 8(a)(3). *National Labor Relations Board* v. *Industrial Cotton Mills,* 208 F.2d 87, 91-92 (4th Cir., 1953), certiorari denied, 347 U. S. 935; *National Labor Relations Board* v. *Robinson,* 251 F.2d 639, 641-642 (6th Cir., 1958); *Olin Mathieson Chemical Corp.* v. *National Labor Relations Board,* 232 F.2d 158, 160 (4th Cir., 1956), affirmed *per curiam* 352 U. S. 1020; *Republic Steel Corp.* v.

[1] The rules regarding the reinstatement rights of unfair labor practice strikers are different and we do not consider them here, see, e.g., *Mastro Plastics Corp.* v. *National Labor Relations Board,* 350 U.S. 270, 278 (1956); *National Labor Relations Board* v. *Remington Rand, Inc.,* 130 F.2d 919, 927-928. (2nd Cir., 1942)

National Labor Relations Board, 114 F.2d 820 (3rd Cir., 1940).

In the instant case, strikers who were participating in a losing economic strike made application for reinstatement on the employer's terms at a time when he was not filling any jobs. The strikers made it perfectly clear that their applications were of a continuing nature. (R. 85-86).[2] Nevertheless, the employer, without giving the strikers any notice that he had openings, subsequently hired, in preference to the strikers, new applicants for positions which the strikers were qualified to fill (R. 86-88-89). The question presented, of great practical importance but narrow legal scope, is thus whether an employer violates the Act not only when he refuses immediate reinstatement to strikers who apply for work when jobs are available, but also when he refuses to honor continuing applications for reinstatement as jobs open up and at the first available opportunity. The position of the AFL-CIO is that his conduct in the latter situation is equally a violation of the Act. The position of the Board, as we understand it, is that his conduct in the latter situation is a violation of the Act, except in instances where the strikers applied for reinstatement at a time when permanent replacements were filling their jobs or when the employer had decided to permanently abolish their jobs. The position of the Company and the Court below is that an employer's conduct in the latter situation is never a violation of the Act unless it is shown that he acted with an anti-union motive (R. 98, 99-100).

1. The reasoning which supports the conclusion that an employer cannot prefer new applicants to strikers who have applied for reinstatement is simple and compelling. Congress specifically provided, in Section 2(3), that strikers do not lose their status as employees, unless they forfeit it, see generally *National Labor Relations Board* v. *Local*

[2] "R" references are to the record as printed for this Court.

Union 1229 IBEW, 346 U. S. 464 (1953); and it provided, in Section 8(a)(1), a firm, clear guarantee against employer action to destroy that status. See *Industrial Cotton Mills, supra*, 208 F.2d at 91-92; *National Labor Relations Board* v. *Burnup & Sims*, 379 U. S. 21 (1964); cf. *National Labor Relations Board* v. *Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir., 1946). Naturally, these Sections of the Act, taken together, do not guarantee strikers remunerative work at the time they seek it, any more than their continued employee status entitles them to wages during the time they are withholding their services. Thus, if at the time they apply for work their jobs are filled by permanent replacements, the employer "is not bound to discharge those hired to fill the places of the strikers", *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346 (1938). By the same token, if their jobs are not open for economic reasons, the employer is not required to put them on the payroll immediately as nonproductive, redundant workers, *National Labor Relations Board* v. *Roure-Dupont Mfg. Co.*, 199 F.2d 631, 634 (2nd Cir., 1952).

On the other hand, Sections 2(3) and 8(a)(1) are not mere surplusage, and they do offer strikers meaningful protection that does not in any way impinge on normal managerial prerogatives. Cf. *National Labor Relations Board* v. *Darlington Mfg. Co.*, 380 U. S. 263, 268-269 (1965). They prevent employers from seizing upon the work stoppage as an occasion for reducing strikers to the status of new applicants for hire, who must enter into competition for jobs with other available workers, and who forfeit accrued but unvested benefits such as seniority, pension rights and vacation pay even if they are eventually reinstated. In short, these Sections continue and give substance to the court-made rule, see Restatement of Torts, Section 776 (1939), that an employer cannot regard a work stoppage in support of lawful demands as a basis for perma-

nently severing his ties with the strikers.[3] Those ties continue as a matter of law, regardless of the employer's view of the matter, see *Jeffrey-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F.2d 134, 136-139 (4th Cir., 1937), certiorari denied 302 U. S. 731, cf. *Burnup & Sims, supra,* 379 U. S. 21. As we have just noted, this rule does not trench upon any right to make basic business decisions. To be sure, it compels the employer to use his striker-employees to carry out those decisions. But considering the fact that he hired them in the first place, when he had free and unfettered discretion, and never discharged them for any work-connected reason, any claim by an employer that this rule unduly interferes with the right to choose his employees freely would have a hollow ring.

It is, of course, true that under the decisions of this Court an employer may, absent an illegal motive, take steps such as building up inventory, continuing his business in face of the strike by hiring permanent replacements, etc., the primary effect of which, in the Court's judgment, is to blunt the economic pressure of the strike upon him provided that these steps have the least possible long term effect on the strikers, consonant with the achievement of that primary goal. *National Labor Relations Board* v. *Brown,* 380 U. S. 278, 283-284, 286 (1965); *Mackay, supra,* 304 U. S. at 345-346. However, if the employer resorts to

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[3] The Seventh Circuit put the essence of that rule as follows: *Iron Welders Union v. Allis-Chalmers Co.,* 166 F.45, 52 (7th Cir., 1908):

> "The employees who remain to take part in the strike or weather the lock out do so that they may be ready to go to work again on terms to which they shall agree—the employer remaining ready to take them back on terms to which he shall agree. Manifestly, then, pending a strike or a lock out, and as to those who have not finally and in good faith abandoned it, *a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment.*" (Emphasis added)

actions the primary necessary effect of which is to injure the strikers far into the future, and well after the strike is settled, or which are not justified by compelling business necessity, or which simply penalize the strikers for going on strike, he has violated the Act. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U. S. 221, 232-233 (1963): *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967).

Plainly, passing over a striker who has applied for reinstatement and preferring instead a new applicant, falls in the latter category. The employer's action does not denote a desire to win the strike, for that has already been accomplished; rather, it demonstrates an intent to punish the strikers, or at the least, to cow them so that they will not again have the temerity to engage in protected activity. *Cf. Ohio Ferro Alloys Corp.* 104 NLRB 542, 546 (1953), enforcement denied on other grounds, 213 F.2d 646 (6th Cir., 1954). These are not the type of legitimate business consideration which can justify interference with the right to strike. Indeed, in many cases, treating strikers as new applicants for hire, rather than employees, would allow employers to achieve the result condemned in *Erie Resistor*. The employer could merely turn to the other side of the same coin by depriving the strikers of previously earned seniority, instead of giving added seniority to the strike breakers. And in taking that step, he would not have the justification offered in *Erie Resistor*—that his action was necessary to keep his business operating during a strike.

2. The basic reasons for the rule which prohibits an employer from bypassing strikers in filling jobs open at the time of their application for reinstatement also require the employer who has no jobs immediately available to honor a continuing application as jobs become available, and at the earliest possible moment. Cf. *National Labor Rela-*

tions Board v. *R. C. Can Co.*, 328 F.2d 974, 981 (5th Cir., 1964), enforcing 140 NLRB 588, 597 (1963); *National Labor Relations Board* v. *Marydale Products Co.*, 311 F.2d 890, 891-892 (5th Cir., 1963), certiorari denied, 375 U.S. 817. Any other conclusion would create an exception which would tend to obliterate the rule.

A strike which causes economic dislocation to the employer, or even succeeds in closing him down, is not necessarily a successful strike. Employees on strike also suffer economic hardships; in many cases, the employer is able to outlast them and they may be forced to request reinstatement on his terms. It is not likely that he will need a full complement at that point. Customers will have drifted away, supply pipelines will have to be reestablished, machinery which has not been in use will have to be restored to an operative state. For example, if the employer's prestrike complement was one hundred men, ninety-five production workers and five maintenance people, and if the plant were shut down, he might well be in a position, because the plant must be put in running order, to rehire only the five maintenance men without injuring himself in any way. Under the theory of the court below, he could thereupon destroy the reinstatement rights of the remaining ninety-five.

Moreover, there will be situations that are far less clear-cut. The employer who has won a strike will often recognize that the achievement of victory was a far from painless process. He may be in a position where he has a choice between getting his full operation under way on the day the strikers seek reinstatement or, at the cost of some slight additional loss, delaying reopening for some time, or reopening by stages. Given the decision of the court below, taking the latter course would destroy the strikers' reinstatement rights, including such seniority and other accrued but unvested benefits as they may have. This would make

them more reluctant to employ concerted activities to secure additional benefits in the future, and it might also drive a good number of the "troublemakers" to take positions with other employers. This, in turn, would afford the employer an opportunity to hire new men who might well be more amenable to seeing his shop run on a non-union basis. Given the strong feelings engendered by labor disputes and the complexity of the task the Board would face if it had to prove bad faith in every case, the rule espoused by the court below would thus place a considerable temptation in the way of employers to seize on this method of penalizing employees who strike. The protection given striking employees, which has heretofore always been held to be a clear, firm guarantee, would thereby be materially weakened. Cf. *Burnup & Sims, supra*, 379 U. S. 21; *Industrial Cotton Mills, supra*, 208 F.2d at 91-92. In addition, to guard against this possible abuse, the Board would frequently have to go deeply into the employer's business decisions relating to restaffing at the conclusion of a strike, a procedure whose necessity should be limited, in the interests of efficient administration of the Act, wherever possible.

Naturally, as we have pointed out before, the value of the right to reinstatement is limited. It is not designed to protect employees at the expense of the employer. It is only designed to preserve the *status quo* as it existed at the time of the strike to the maximum feasible extent and to prevent unjustified employer-initiated changes in that status. Thus, where the strike causes long term dislocations by costing the employer business that he never regains, both suffer and the right to reinstatement remains inchoate. By the same token, if the employer changes his production process during the strike in a manner which permanently reduces his manpower needs and if there is no employee turnover thereafter, the strikers'

reinstatement rights are rendered less valuable.[4] Neither of these instances justifies bypassing strikers whose services are needed; they are examples of inherent risks implicit in the nature of the employee-employer relationship and in neither of them can it be said that the employer's action destroyed the strikers' rights. Bypassing strikers to hire new applicants, on the other hand, serves no legitimate interest; it is, purely and simply, a destructive act. The employer's interest in refusing to honor a continuing application for reinstatement when jobs become available is no stronger than his interest in refusing to honor an application made when he is actually filling jobs. In this connection it should be noted that the employer here has never given any reason for bypassing the strikers. See *Great Dane Trailers, Inc., supra,* 388 U.S. at 34-35. The only added element is that the employer would have to give the strikers reasonable notice of openings as they occurred. The key words in evaluating this burden are "reasonable notice". Surely, it is not too much to ask, with so much at stake, that he send a letter and make a call to the address left by the striker. Indeed, recall systems are a commonplace in the normal working arrangements of most employers since they are a rational response to a basic problem which grows out of the necessities of industrial relationships.

Employers know that normally they have a fluctuating need for labor because of the natural ebb and flow of demand in their product markets and because of the difficulties in maintaining a continuous regulated flow of sup-

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[4] Production changes during a strike may cause problems relating to the duty to bargain imposed by Section 8(a)(5) of the Act. We do not treat these problems here. See generally *Hawaii Meat Co.*, 139 NLRB 966 (1962), enforcement denied, 321 F.2d 397 (9th Cir., 1963); *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203 (1964); compare *Railway Employees* v. *Florida East Coast R. Co.*, 384 U.S. 238, 246-248 (1966).

plies. This being so, they recognize that it is in their interest to have a rational system under which they can quickly meet an increased need for labor when it occurs. Thus, when they face a downturn, they do not normally sever their ties with the employees who are let go. A system is set up whereby both parties understand that when an upturn comes, the workers let go will be notified of openings and will have first call on the jobs that open up. In this sense, they are employees, employees here meaning that they have certain rights for positions they have the skill to fill, as against new applicants for work. In almost every union plant, this process of recall has been set out in the labor contract in explicit terms. For example, the following is the provision that appears in the illustrative contract Professors Cox and Bok have included in their Labor Law Cases and Materials (Statutory Supplement) 150 (6th Ed., 1966):

> "(E) Lay-offs and Recalls: In all cases of lay-offs and recalls following lay-offs, seniority as established by the applicable seniority lists shall govern. In cases of lay-offs, the last one in shall be the first one out, and in cases of recall, the last one out shall be the first one in."

See also BNA Collective Bargaining Negotiations and Contracts, Sec. 60.

3. To this point our argument, while it may diverge in some aspects of its reasoning, is in all essentials parallel to that of the Board. However, the Board believes that an employer must honor a striker's continuing application for reinstatement, when filling an open job the striker has the ability to perform, only if the striker's job was not considered to have been permanently abolished or was not being filled by a permanent replacement at the time the striker offered to return to work. See *Atlas Storage Division*, 112 NLRB 1175, 1179-1180, 1197 (1955), enforced, *sub. nom., Chauffeurs Local 200* v. *National Labor Relations*

Board, 233 F.2d 233, 238 (7th Cir., 1956); *Brown and Root, Inc.,* 132 NLRB 486, 493-494, 521-522 (1961), enforced as modified, 311 F.2d 447 (8th Cir., 1963). These cases rest on the assumption, shared by the Board and the lower courts, without exception but also without explanation, that in *Mackay, supra,* 304 U. S. at 345-346, this Court decided that permanent replacement of a striker at the time he applies for reinstatement destroys the striker's employee status. Thus, in order for the Board's theory to prevail here, it must show that the jobs of the strikers who made continuous application for reinstatement were not considered to have been permanently abolished and were not being occupied by permanent replacements at the time of the application. We propose a simpler standard which is more faithful to the Act itself and to the actual decision in *Mackay.* We submit that an employer must honor a striker's continuing application for reinstatement as jobs open up and at the earliest possible moment, without regard to whether his job was considered to have been permanently abolished or was being filled by a permanent replacement at the time the application was made.[5]

In *Mackay,* the Board found that the Company had discriminated against union leaders in reinstating strikers to fill open places at the end of a strike. The Court affirmed

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[5] One refinement of this statement, not immediately relevant here, must be noted. The fact that a job is unavailable because of temporary strike related business conditions is a valid reason for denying immediate reinstatement, see p. 4 *supra.* However the fact that a striker's job is being filled by a temporary replacement is not a valid reason for denying [redacted] him reinstatement, see cases cited on p. 17 *infra.* Thus in the latter situation even under the rule we suggest the question of whether the replacement was permanent or temporary would still be relevant. In the former situation, however, for the reason set forth above, we submit that the distinction between permanent and temporary economic effects of a strike is not relevant in determining the striker's rights.

that finding, and in the course of its discussion, stated, 304 U. S. at 345-346, 347:

> "Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although §13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employes. Any such discrimination in putting them back to work is, therefore, prohibited by §8.
>
> * * * * * * *
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> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employes would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union. There is evidence to support these findings."

As the Act was first proposed by Senator Wagner in 1934, it protected the employee status of strikers but explicitly denied that status to strike replacements. See 1 Legislative History of the National Labor Relations Act of 1935, 2 (G.P.O. 1949). If that bill had been enacted into law, economic strikers as well as unfair labor practice strikers, see *Remington Rand, supra,* 130 F.2d at 927-928, would, of course, have been given the right to displace permanent replacements, and to be reinstated ahead of new applicants for hire, see p. 2, *supra.* This would have meant that during a strike an employer would not have had the option of conducting his business in a normal manner by recruiting workers on the understanding that they could retain their jobs as long as their services were required and proved satisfactory. This point was stressed by management representatives, see e.g. 1 Leg. His. of the N.L.R.A., *supra,* 395, 464, 535, 721; and the clause denying employee status to strike replacements was dropped from the final version of the Act. Thus, seen in context, the Court's opinion in *Mackay* was simply a determination that both strikers and their permanent replacements were to be considered employees for the purposes of the Act. Therefore, Section 2(3) was not to be viewed as tipping the balance in favor of the strikers by requiring the employer to discharge the replacements.

There is not a word in the opinion, or so far as we have been able to ascertain in any subsequent opinion by this Court, that indicates that the Court took the further step of holding that the fact that they had been permanenly replaced at the time they applied for reinstatement deprived the strikers of their rights vis-a-vis new applicants for hire, should their jobs become open again, or of the protection implicit in their employee status against forfeitures of seniority and other accrued but unvested benefits, should they eventually return to work for the employer. There was no occasion for the Court to determine the

proper rule to govern this further and quite different question, since there were no new applicants in the picture. Indeed, the Court, throughout its opinion, referred to the replaced strikers as *employees;* and it apparently assumed that they would have the right to reinstatement if jobs opened up in the future, since it stated that there were "a number of methods of determining which of its striking employees would have to *wait* . . ." for reemployment. Certainly, the Court's reasoning does not require such an extension of what was decided. That reasoning is simply that the employer "has the right to protect and continue his business" and that inherent in that right is the capacity to hire new employees whom "he is not bound to discharge . . . upon the election of strikers to resume their employment", 304 U. S. at 345-346. There is nothing in this line of argument to suggest that the employer can use this permission, not only to protect and continue his business during the strike, but also to penalize the strikers, by taking action which is not essential to that primary purpose, after they have applied for reinstatement. Indeed, we read *Erie Resistor, supra,* 373 U. S. at 232, as indicating that the Court recognizes that *Mackay* does not in any way sanction employer action to penalize the strikers for engaging in protected activity. And as we have attempted to demonstrate thus far, an employer who bypasses strikers seeking reinstatement and instead hires new applicants for jobs, as they become available, is acting in a manner which, purely and simply, penalizes strikers. For the employer's legitimate interests are fully protected if he is permitted to run his business in a normal manner during the strike and if he is not required to reinstate strikers prior to the time when economic conditions permit him to do so. The rule we propose for adoption fully recognizes that interest. Thus, our argument here is that *Mackay* was a limited response to a limited legitimate interest, a response which should not be transmuted into an unlimited rule which goes be-

yond, and indeed, contradicts the basic reasoning of the decision.

A simple example should make our basic point clear. A striker's job is being filled by a permanent replacement on the day he makes a continuing application for reinstatement; however, three days later, the replacement is discharged for cause, or quits to take another permanent job, or becomes seriously ill. The employer then bypasses the striker and hires a new applicant for employment as a permanent employee to fill the job. In this situation, which is in essence that of *Atlas Storage Division, supra,*[6] what additional interest can the employer be said to be serving that was not present in the case where the job was temporarily unavailable at the time of the application? We do not believe that there is any additional interest. Of course, it might be argued that the employer is simply extending his power to fight the strike, but the man who helped him fight the strike has removed himself or has been removed from the scene, and the new hire has no strike to fight. In short, we suggest that as between a striker, with a continuing application for reinstatement, and a new applicant for employment there are no classes of open jobs. The reason the position was not originally available is without legal significance. Thus, the same rule—that the employer cannot bypass the striker and prefer the new applicant—should always apply. Interestingly enough, and we believe that this strengthens our position, the Board has recognized that the act of permanently replacing a striker, standing alone, does not destroy the striker's employee status. For it has held that if the replacement vacates the job prior to the striker's application, thereby leaving the job open, the employer must reinstate the striker. *Union Bus Terminal of Dallas, Inc.*, 98

[6] It could be argued that in *Atlas Storage Division* and in *Brown and Root, supra,* the strikers did not make continuing applications. If that is all those cases mean then they are simply irrelevant to the issue here.

NLRB 458 (1952); *Titan Metal Mfg. Co.*, 135 NLRB 196, 211 (1962).

We recognize that it might be argued that the erroneous view of the law we attack here has been frozen into the Act and cannot now be corrected. But we know of no rule of law or equity which requires this Court to acquiesce in an erroneous interpretation, by the Board and the lower courts, of one of its decisions, an erroneous interpretation which has no basis in logic or statutory law, and which, so far as we know, has never been relied on by this Court or even called to its attention. Nor is there any basis for saying that anything Congress did in amending the Act, in 1947 and 1959, precludes the adoption of our position.

In both 1947 and 1959 Congress did pass on the effects of *Mackay* on Section 9 representation elections, but it did not deal with Section 2(3), the cornerstone of our argument, which has never been amended, or with *Mackay's* effects on Section 8, the unfair labor practice section. Subsequent to *Mackay* and prior to 1947, there was heated controversy as to that decision's effect on the right of replaced strikers to vote in representation elections held during a strike. See *A. Sartorious & Co.*, 10 NLRB 493 (1938); *Rudolph Wurlitzer Co.*, 32 NLRB 163 (1941). In 1947, Congress responded by amending Section 9(c)(3) of the Act to provide that a striker, not entitled to reinstatement as of the date of the election, could not vote. 1 Legislative History of the Labor Management Relations Act of 1947, 10, 431, 553-554 (G.P.O. 1948). In 1959, this amendment was modified, and the Board was given the power to allow strikers, whose jobs were being filled by permanent replacements at the time of the election, to vote during the first twelve months of the strike. 1 Legislative History of the Labor Management Reporting and Disclosure Act

of 1959, 427-429, 452, 762, 763, 783, 941-942 (G.P.O. 1960); see *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962). Thus, the problem Congress has dealt with is far different from that presented for decision here. Following the logic of *Mackay*, Congress has limited itself to the consideration of the comparative rights of strikers vis-a-vis other employees who have permanent ties with the employer. On the other hand, as we have stressed, the issue here concerns the comparative rights of strikers vis-a-vis new applicants for hire.

4. Should the Court reject the argument we make in point 3, *supra*, it must determine whether the Board correctly concluded that the strikers' jobs were not being filled by permanent replacements and were not considered to have been permanently abolished at the time they applied for reinstatement. Since this is an affirmative defense to the unfair labor practice charge, the burden is on the employer. *National Labor Relations Board* v. *Plastilite Corp.*, 375 F.2d 343, 350 (8th Cir., 1967); *M. Eskin & Son*, 135 NLRB 666, 668-669 (1962), enforced as modified, 312 F.2d 108, n.3 (2nd Cir., 1963), cf. *National Labor Relations Board* v. *Mooney Aircraft Inc.*, 366 F.2d 809, 812-813 (5th. Cir., 1966). We need not go deeply into the issue of permanent replacement, for it is incumbent on the employer, at the minimum, to show that at the time he hired a new man or transferred a non-striking employee to the striker's job, he had a contemporaneous intention to supersede a striker on the payroll. In other words, he must show that his responses to the strike were not of a temporary or makeshift nature. *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (2nd Cir., 1942); *Marydale Products Co., supra*, 311 F.2d at 891-892. In the instant case, as we read the record, the employer made no showing at all on this point. Turning then to the

question of permanent abolition, we submit that the employer must show that he acted on the basis of long-term structural factors which presented a reasonable basis for believing that his manpower needs, after he had recovered from the transient effects of the strike, would be less for the foreseeable future than they had been in the past. For example, it would be incumbent upon him to show an overall loss of business from which there was no reason to believe he would recover, or permanent labor saving changes in production techniques which are not counterbalanced by a contemplated expansion of business. In the instant case, the record, as made by the employer, proves that there were no permanent business losses or changes in techniques. The employer's problems were all strike-connected—the lack of supplies caused by cancellations of orders for them by the employer and the problems encountered in training replacements (R. 85-86). He intended at all times to return to prestrike levels of production and employment "as soon as possible" *ibid.* As Judge Ely noted in dissent, this simply is not a showing that the strikers' jobs had been ". . . do[ne] away with wholly" or "destroy[ed] completely"; and that is the showing which should be required (R. 103-104).

CONCLUSION

For the above stated reasons we respectfully submit that the Court of Appeals' decision should be reversed and that the Board's Order should be enforced. We further submit that in enforcing the Board's Order this Court should make it clear that an employer has an obligation to honor a striker's continuing application for reinstatement as jobs become available, and at the earliest possible moment, without regard to whether the striker's job was being filled by a

permanent replacement or was considered to have been permanently abolished at the time the application was made.

Respectfully submitted,

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August, 1967